

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAR-FRESHNER CORPORATION and JULIUS SÄMANN
LTD.,

Plaintiffs,

Civil Action No.:
5:17-cv-171 (TJM/ATB)

v.

AMERICAN COVERS, LLC f/k/a AMERICAN COVERS,
INC. d/b/a HANDSTANDS, ENERGIZER HOLDINGS, INC.,
and ENERGIZER BRANDS, LLC,

Defendants.

LOUIS ORBACH, ESQ., declares, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a member of the law firm of Bond, Schoeneck & King, PLLC, counsel for Plaintiffs CAR-FRESHNER Corporation (“CFC”) and Julius Sämann Ltd. (“JSL”) (collectively, “Plaintiffs”) in the above-captioned litigation (the “Action”).

2. I make this Declaration in support of Plaintiffs’ Motion to Preclude the Expert Report and Testimony of John G. Plumpe (the “Motion”).

3. On February 16, 2017, Plaintiffs commenced this Action by filing a Summons and Complaint in the District Court for the Northern District of New York.

4. On March 31, 2017, issue was joined when Defendants American Covers, LLC f/k/a American Covers, Inc. d/b/a Handstands (“Handstands”), Energizer Holdings, Inc., and Energizer Brands, LLC (collectively, “Defendants” or “Energizer”) filed an Answer to the Complaint.

5. On April 11, 2017, Plaintiffs filed an Amended Complaint. A copy of the Amended Complaint is attached hereto as **Exhibit A**.

6. On April 25, 2017, Defendants filed an Answer to the Amended Complaint. A copy of the Answer to the Amended Complaint is attached hereto as **Exhibit B**.

7. Thereafter, the parties engaged in fact discovery.

8. Among other things, Plaintiffs served on Defendants a Notice of Rule 30(b)(6) Deposition (“30(b)(6) Notice”), to which Defendants responded on October 2, 2017. A copy of Defendants’ Response and Objections to the 30(b)(6) Notice, which is also Lampman Deposition Exhibit 1, is attached hereto as **Exhibit C**.

9. One of the topics designated by Plaintiffs in the 30(b)(6) Notice was “Defendants’ gross revenues, net revenues, and profits from sales of goods under the Infringing Marks.” *See* Exh. C, p. 5.

10. Defendants “designate[d] Mike Lampman to testify to nonprivileged information respecting Energizer’s gross revenues, net revenues, and profits from sales of goods under the dual marks MIDNIGHT BLACK and ICE STORM and the BOARDWALK BREEZE mark.” *See id.*

11. Plaintiffs conducted the Deposition of Michael Lampman on December 5, 2017. A copy of excerpts of his deposition testimony is attached hereto as **Exhibit D**.

12. A copy of Lampman Deposition Exhibit 10, so marked during his deposition, is attached hereto as **Exhibit E**. Lampman Deposition Exhibit 10 also was marked as Plumpe Deposition Exhibit 8 and Sedlak Deposition Exhibit 3.

13. A copy of Lampman Deposition Exhibit 20, so marked during his deposition, is attached hereto as **Exhibit F**. Lampman Deposition Exhibit 20 also was marked as Plumpe Deposition Exhibit 9 and Sedlak Deposition Exhibit 4.

14. On April 16, 2018, after the close of fact discovery, Defendants served the “Expert Report of John G. Plumpe” (the “Plumpe Report”). A copy of the Plumpe Report, with exhibits, is attached hereto as **Exhibit G**.

15. Upon review of the Plumpe Report, it became clear to Plaintiffs that, in the course of reaching his opinion, Mr. Plumpe received from Defendants access to documents, data, and witnesses that Defendants had refused to produce or otherwise failed to properly disclose during fact discovery.

16. Among other things, Mr. Plumpe reportedly relied on information he gathered from discussions with Energizer employee Ryan Sedlak, who was never identified in Plaintiffs’ mandatory disclosures or designated as a 30(b)(6) witnesses for any topic.

17. Based on the foregoing, Plaintiffs requested the Court reopen discovery for the limited purpose of allowing Plaintiffs to address the factual matters set forth in the Plumpe Report that Defendants failed to previously disclose. [Dkt. 70]

18. After reviewing Defendants’ response and conducting a telephonic hearing, the Court granted, in part, Plaintiffs’ request. [Dkt. 76] Specifically, the Court directed Plaintiffs to depose Mr. Plumpe prior to the reopening of fact discovery, and then, *inter alia*, if Plaintiffs believed a deposition of Mr. Sedlak was necessary, Plaintiffs were granted leave to notice his deposition. [Dkt. 76]

19. Plaintiffs conducted Mr. Plumpe’s deposition on June 22, 2018. A copy of excerpts of his deposition testimony is attached hereto as **Exhibit H**.

20. A copy of Plumpe Deposition Exhibit 5, so marked during his deposition, is attached hereto as **Exhibit I**. Plumpe Deposition Exhibit 5 also was marked as Sedlak

Deposition Exhibit 7. Plumpe Deposition Exhibit 5 is referred to in Plaintiffs' accompanying Memorandum of Law as the "LBIS Workbook."

21. A copy of Plumpe Deposition Exhibit 11, so marked during his deposition, is attached hereto as **Exhibit J**. A copy of Plumpe Deposition Exhibit 12, so marked during his deposition, is attached hereto as **Exhibit K**. Together, these documents constitute the document referred to in Plaintiffs' accompanying Memorandum of Law as the [REDACTED]

22. Plaintiffs then deposed Mr. Sedlak on August 1, 2018. A copy of excerpts of his deposition testimony is attached hereto as **Exhibit L**.

23. A copy of Sedlak Deposition Exhibit 1, so marked at his deposition, is attached hereto as **Exhibit M**. Sedlak Deposition Exhibit 1 also was marked as Plumpe Deposition Exhibit 4. Sedlak Deposition Exhibit 1 is referred to in Plaintiffs' accompanying Memorandum of Law as the "Infringing Products Workbook."

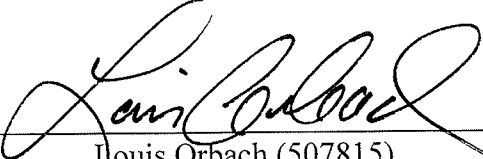
24. A copy of Sedlak Deposition Exhibit 5, so marked at his deposition, is attached hereto as **Exhibit N**. It is another copy of the document referred to as the [REDACTED]

25. A little over a month after Mr. Sedlak's deposition, on September 21, 2018, Defendants served on Plaintiffs the "Rebuttal Expert Report of John G. Plumpe" (the "Plumpe Rebuttal Report"). A copy of the Plumpe Rebuttal Report, with exhibits, is attached hereto as **Exhibit O**.

26. A copy of the email referenced in footnote 148 of the Plumpe Report and footnote 93 of the Plumpe Rebuttal Report is attached hereto as **Exhibit P**.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on November 2, 2018



Louis Orbach (507815)